Supreme Court, U.S.
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85-896

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

CAROL C. JOHNSON,

Petitioner,

—against—

LINDEN SHORE DISTRICT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. Whether the Trial Court herein, and/or the (intermediate) State Appellate Court and/or the State Supreme Court has or have so far unconstitutionally departed from the usual legal course of judicial proceeding and judicial adjudication and/or so far sanctioned such departure by any other of the Courts which have acted herein as to call for an exercise of this United States Supreme Court intervention and/or supervision.

2. Whether the Trial Court herein, the (intermediate) State Appellate Court and/or the State Supreme Court has or have so far departed from the accepted and usual legal course of judicial proceeding and judicial proceeding as to deprive Petitioner herein of due process and/or legal protection as to call for exercise of the U.S. Supreme Court's review and/or suspension.

3. Whether the State Trial Court, the State Appellate and/or the State Supreme Court which by their respective decisions herein have deprived Defendant of Due Process and/or Equal Protection in violation of the Constitution of the United States, Amendment XIV Section 1 and/or in violation of the Constitution of the State of Connecticut Article FIRST sections 8, 10, 20 (or any one of them) dealing with Due Process and Equal Protection.

4. Whether the three courts involved in this case have singly or in any combination obstructed the application of C.G.S. Sec. 7-325 to the facts of this case and applied a law of their own making, thus denying Petitioner due process of law and equal protection of the law to the effect that the judiciary must not overrule constitutional laws promulgated by the legislature. Legislative action is due process (16c C.J.S. p. 186 column 2 note 15) and to interfere with its statutes that have become law is a denial of due process to Petitioner.

5. Whether the State Court, the State Appellate Court and/or the State Supreme Court have intentionally and/or unlawfully violated the mandatory Connecticut General Statute, Section 7-325 which has set the requisite legal steps necessary to be taken before a District can be legally formed thereby depriving Petitioner herein of Due Process and Equal Protection in violation of the Constitution of the United States, Amendment XIV Secion 1 and/or in violation of the Constitution of the State of Connecticut, Article FIRST sections 8, 10 and/or 20 by illegally refusing to enforce the mandatory and jurisdictional provisions specified in Section 7-325 as to the steps which must be taken as a prerequisite to the formation of a District thereunder and especially refusing to enforce the mandatory jurisdictional requirements therein as to publication which point was put in issue by Petitioner's (Defendant's) General Denial of the allegation by the "District" that "Linden Shore District" was formed under General Statutes Section 7-325, since there was no proof of the publication required by said Statutes for formation of a District.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States.

Carol C. Johnson, the petitioner herein prays that a writ of certiorari issue to review the judgment and final order of the Supreme Court of the State of Connecticut.

OPINION BELOW

The last opinion below is that of the Connecticut Supreme Court dated July 31, 1985 reading as follows: Order—The Motion of the Defendant filed July 29, 1985, to reargue and to reopen the Decision and to include reply having been presented to the Court, it is hereby ordered denied.

The prior order dated July 17, 1985 denied Defendant's request for certification to appeal from the Appellate Court.

These orders and all prior orders and opinions are set up in the Appendix in reverse order, that is to say, the latest order in point of time is at the top of the list.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(c) and Supreme Court Rules. The most pertinent parts being as follows.

> Section 1257(c). State courts; * * * certiorari.
>
> Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court as follows.
>
> > (3) By writ of certiorari * * * where any * * * right, privilege or immunity is specially set up or claimed under the Constitution (of the United States) Fourteenth Amendment section one nor shall any State [and this includes Courts which are State agencies] without due process of law, deny to any person within its jurisdiction the equal protection of the law.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article XIV, Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Constitution of the State of Connecticut, Article First, Section 8: * * * No person shall * * * be deprived of * * * property without due process of law." Section 10: * * * every person, for an injury done to him in his * * * property * * *, shall have remedy by due course of law, right and justice * * *. Section 20: No person shall be denied equal protection of the law * * *.

STATEMENT OF THE CASE

An action entitled LINDEN SHORE DISTRICT against Carol Clement Johnson (Petitioner herein) was instituted in the Connecticut Superior Court in New Haven.

The Summons in the space for Plaintiff's name reads, "LINDEN SHORE DISTRICT, a district organized and existing pursuant to Conn. Gen. Stat. par. 7-325 located in Branford Connecticut" against Petitioner herein named as Defendant.

The Complaint reads, "1. The Plaintiff is a district organized and existing under the provision of the Connecticut General Statutes and is a body corporate and politic, and has the powers for which it was formed, including the power to levy and collect taxes. 2. The Defendant, Carol Clement Johnson, on October 1, 1971 was the record owner of real estate situated in the plaintiff district bounded and described as follows" (There follows a description of the property).

Then there is set forth in paragraph 3 ten tax liens assessed against Petitioner's property starting with October 1, 1971 to and including July 1, 1981 (the total amount for the ten years being $100.35) The judgment is for $2346.69 plus interest from May 15, 1984 and $1750 and $2000 attorney fees.

Then follows statements that no part of the taxes had been paid and that the liens were recorded. (Petitioner received no notice of any recording until the Summons and Complaint were served.)

There was no testimony nor evidence of any kind as to publication having been made as required by Sec. 7-325 which requires publication on two successive days with an interval of at least 14 days between the publication and the day of hearing specified therein at which hearing and meeting date a vote was to be taken to determine whether or not the voters wanted a District to be formed.

There was an attempt made to prove publication by the documents set forth below. The front side of one of the documents designated as AFFIDAVIT OF NOTICE, the reverse side showing two notices in newspaper publication form. Under one is the following notation, namely "Aug. 6, 1959 Register" under the other "Aug. 7, 1959 Register." In both notices the date of hearing to be held is set forth as August 20, 1959.

Since the Connecticut law requires that there be at least 14 days between the publication date and the hearing date and since there is only 13 days between August 6 and August 20 and only 12 days between August 7 and August 20 there is no compliance with the unequivocal, mandatory statutory requirement of at least a 14 day interval between the date of publication and the date set for a meeting. There is therefore complete failure to comply with the law Sec. 7-325 and no action on the 20th of August at the meeting would be recognized as legal as the meeting would not be a meeting in compliance with C.G.S. Section 7-325.

In addition the affidavit of notice on its face is false since no one on August 6th can truthfully swear that publication had been made on August 7th a day in the future yet to arrive.

As soon as the above was put in evidence Petitioner waited to see if any correction of the omission to prove actual publication was made and when it was not forthcoming by the end of plaintiff's case and before defendant put in his case Petitioner moved for dismissal on the ground that there had been no proof of formation of a District under and as required by C.G.S. Sec. 7-325 and that there was no legal plaintiff and therefore no one empowered to bring an action and the so called "foreclosure action" was in fact no controversy between hostile parties as there was no legal plaintiff. The three courts refused to apply these facts thus refusing to apply and conform to mandatory prerequisites set up in the law, Sec. 7-325.

There is a very mysterious element in this case.

While I was on the witness stand a document exactly similar to what is now in evidence bearing title "Affidavit of Notice" signed by the Selectman with two notices in proof form was handed to me except on the face of the "Notice" in large bold handwriting starting from the lower left running to the upper right were the words "we are CAUSING." Such a statement added as above stated destroyed the statement in type (below the handwriting) reading "2. They [the Selectmen] CAUSED notices to be given. The handwritten word showed that the selectmen have not CAUSED notices to be given by making the document read we are CAUSING indicating the acts have not yet been done.

The attorney Mr. Donegan took the instrument from me and handed it to the judge and the judge took time to look at it and the document then passed through Mr. Donegan's hands to the Court Clerk to be marked in evidence BUT the document now listed as a part of Exhibit A does NOT carry the bold handwriting on it.

Somewhere from the time it left my hands to the marking by the clerk of an exact duplicate without the handwriting as Exhibit A the document handed to me had disappeared.

Since I was so impressed by the Bold Handwriting I asked the Court at the first recess to let me see the document. The Court refused.

This request was repeated 4 times at different intervals and each time the Court refused to let me see the exhibit.

At the end of the trial the Court again refused to let me see the exhibit and I only saw it later in the Clerk's Office downstairs after the trial so I lost the chance of making an issue of the switch during the trial. I put the complaint into the appeal papers and into the Appellate Court but nothing was done about it.

I still think that something should be done about getting an explanation as to why a document so favorable to me disappeared.

In a contemporary case following his hearing of this case the same Judge moved from the center of his bench over to the end of the bench leaning over to my opponent (a lawyer) on the witness stand and in a low voice which I could not hear talked with my opponent and then as he moved away back to the center of the bench said, "I may have to ask you to amend your complaint." The judge refused to tell what he had said. I felt that this was equivalent to leaving the bench and acting as an attorney for my opponent.

REASONS FOR GRANTING THE WRIT

Linden Shore District unlawfully set itself up as a Plaintiff unlawfully alleging that it had been formed as a District under C.G.S. § 7-325. (set forth below)

§ 7-325. Organization

Upon the petition of twenty or more voters, as defined by section 7-6, of any town, not residing within the territorial limits of any city or borough in such town, specifying the limits of a proposed district for any or all of the purposes set forth in section 7-326, and not including within such limits any part of any city or borough in such town, the selectmen of such town shall call a meeting of the voters residing within such specified limits to act upon such petition, which meeting shall be held at such place within such town and such hour as the selectmen designate, within thirty days after such petition has been received by such selectmen. Such meeting shall be called by posting a written notice of the same, signed by the selectmen, upon some public signpost within such town and also in some prominent place within such proposed district, at least fourteen days before the time fixed for such meeting, and by advertising such notice in two successive issues of some newspaper published or circulated in such town. Upon approval of such petition by such meeting, the voters may name the district and choose necessary officers therefor to hold office until the first annual meeting therof; and the district shall thereupon be a body corporate and politic and have the powers, not inconsistent with the general statutes, in relation to the objects for which it was established, that are necessary for the accomplishment of such objects, including the power to lay and collect taxes. The clerk of such district shall cause its name and a description of its territorial limits and of any additions that may be made thereto to be

> recorded in the land records of the town in which such district is located.

(1949 Rev., § 764; 1955, Supp. § 340d; 1957, P.A. 465, § 17(b).)

As the trial proceeded it became evident that there had been no compliance with mandatory prerequisites of Section 7-325. There was a complete failure of proof of publication. At the end of Plaintiffs case I moved for dismissal and then again at the end of the trial.

The trial court deliberately refused to apply the law set up by the Legislature (Sec. 7-325)

The laws are a statement of what is due process—in the field covered by the law.

Thus the District Court and the two Appellate Courts denied Petitioner of due process and equal protection by deliberately refusing to apply this law.

This denial was compounded when these Courts refused to pass upon Petitioner's request to them to decide the Constitutional question of whether the deliberate refusal to apply the said law was not a violation of due process and equal protection.

Such refusal in itself is a denial of due process and equal protection and unconstitutional and their action should be set aside.

Appeals have a purpose. One is to test a finding made by looking at the evidence to check whether there are facts in the case which would sustain the finding.

The trial court, Judge Norton M. Levine has made a finding to the effect that the Plaintiff was legally formed yet there is no evidence whatsoever that substantiates such a finding.

Without such a finding there would be just a phantom, a ghost, with no power to bring the action and judgment would have to be entered dismissing the action.

The nearest approach to any substantiation of the finding falls short and is as follows.

The town selectmen made a written statement dated August 5, 1959 in which there is a statment that "they caused notices to be given of a meeting * * * by * * * (c) causing a copy of the notice to be published on August 6th and August 7th, 1959 in the New Haven Register a paper with circulation within town of Branford. (3) a copy of said notice, as the same appeared in said newspaper is attached hereto below and made a part of this affidavit."

AFFIDAVIT OF NOTICE

STATE OF CONNECTICUT
COUNTY OF NEW HAVEN

ss/ Branford, August 5, 1959

DOMINIC BONTATIBUS, RICHARD W. SQUERI AND JOHN J. COOLAC, being duly sworn, depose and say:

1. They are the Selectmen of the Town of Branford.

2. They caused notices to be given of a meeting of the voters residing within the limits of a proposed district within the Town of Branford as more particularly set forth in a petition to the Selectmen dated August 4, 1959, by

a. causing a copy of a notice of said meeting to be posted on the public signpost in the Town of Branford;

b. causing a copy of the notice to be posted on a bulletin board within the boundaries of said proposed district; and

c. causing a copy of the notice to be published on August 6th and 7th, 1959 in the New Haven Register, a newspaper with a circulation within the Town of Branford.

3. A copy of said notice, as the same appeared in said newspaper is attached hereto and made a part of this affidavit.

/s/ DOMINI[illegible]BONTATIBUS

/s/ RICHARD W. SQUERI

/s/ JOHN J. COOLAC

Subscribed and sworn to this 6th day of August, 1959, before me.

/s/ (illegible)
Notary Public

This notice was signed by the selectmen and at the end there is the following "Subscribed and sworn to this 6th day of August 1959, before me" and then the signature of the Notary Public.

The attached copies are on one page and appear to be in the usual form of a newspaper advertisement and contain a statement that a meeting will be held on August 20, 1959. Under one copy is the handwritten date Aug. 6, 1959 Register and under the other copy Aug. 7, 1959 Register. At the meeting the voters were to determine whether they wanted a District formed.

Obviously the affidavit is false. The Selectmen on August 6, 1959 could not swear that publication of a notice had been made on August 7, 1959 a day in the future which had not arrived.

So there is no proof of advertising actually made, certainly not on August 7, 1959.

And of course the advertisement with the date Aug. 7, 1959 can not mean that it is a true copy clipped from a paper of August 7, 1959 as on August 6th the August 7th newspapers had not been printed and circulated.

So the statutory requirement of advertisement on 2 successive days in order for a District to be formed was never proven—there was no other proof.

Petitioner, herein, ordered a complete transcript of the trial so that along with the exhibits all evidence was available to the attorney, Mr. Donegan, and the Appellate Courts.

Neither Mr. Donegan by testifying nor the Appellate Courts dared state that the publication was ever made on two successive days yet each had all the evidence and exhibits before them. If there was any such proof clearly the Trial Court Judge Norton M. Levine, Mr. Donegan and the Appellate Judges would have pointed it out to refute Petitioner's assertion of no such proof existed nor was ever made.

Indeed there is an even greater proof that the District was never legally formed—never came into existence.

This proof is that in addition to the above Statute, C.G.S. § 7-325 states as a prerequisite to the legal formation of a District the publications must be made not less than 14 days before a meeting could be held on the date set in any publication and in this case the date chosen was the 20th of August, 1959.

Even if the publication was made on August 6 and August 7th as the false affidavit states there are only 13 days between August 6th and August 20th, namely, the dates August 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 (13 days) and there are only 12 days between August 7th and August 20th, namely August 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 (12 days).

Under Connecticut Law the date of publication and the date for hearing are not counted in the compilation of at least a 14 day interval. (See case following here to such effect.)

Point One.

Publication of notice of said hearing, as required by law, was not duly made, in that said publication of said notice of hearing was first made on July 10, 1965 and again on July 16, 1965 and a hearing pursuant thereto was held on July 20, 1965. (R. p. 7, Ex. B)

Connecticut General Statute, Revision of 1958, Section 8-7, provides for notice and specifies the manner in which it is to be given, and it reads as follows:

> "Appeal to Board (reference is to Zoning Board of Appeals). • • • Said board shall fix a reasonable time for the hearing of any appeal and give due notice thereof to the parties. Notice of the time and place of such hearing shall be published in a newspaper having a substantial circulation in such municipality at least twice at intervals of not less than two days, *the first not more than fifteen days, nor less than ten days*, and the last not less than two days *before such hearing*." (Emphasis supplied)

Division III of the Limited Finding reads in part: (R. pp. 39 and 40)

"The plaintiff made the following claims of law respecting the judgment to be rendered upon which the Court ruled as hereinafter stated:

• • •

13. That the zoning board of appeals acted without the prerequisite notice by publication as required by the General Statutes in such case thereby precluding the board from acquiring jurisdiction to hear the appeal to it and the hearing thereunder was a nullity and void and should be so declared.

• • •

The Court overruled said claims and rendered judgment for the defendants as on file."

The court erred in not looking into the record on appeal from the decision of the Zoning Board of Appeals and in not thereupon holding that the Branford Zoning Board of Appeals had acquired no jurisdiction to hold its hearing and render a decision granting a variance because of the failure of said Board to give notice of hearing in the manner prescribed as a prerequisite and required by law and the court's action was a denial of due process and equal protection of the law under the Constitutions of the United States and the State of Connecticut.

In the case of *Samson* vs. *Bergin*, 138 Conn. 306, 84 A.2d 273 it was held that the judgment of a court without jurisdiction may always be challenged, whenever and wherever declared on as a source of right.

The courts have interpreted the provisions of General Statute 8-7 as to its provision as to notice and have held that both terminal dates are excluded, that is the date of first publication and the date of hearing are excluded, and ten full days must intervene between the terminal dates.

Cases in point are as follows.

In the case of *Lunt* vs. *Zoning Board of Appeals*, 150 Conn. 532, 191 A.2d 553, The Supreme Court of Errors, Murphy, J., held that notice which was published on November 3 concerning hearing to take place on request for zoning variance on November 13 was fatally defective on ground that intervening period between the date of publication of notice and date of hearing was nine days instead of 10 day minimum required by statute. (Error; judgment set aside and remanded with direction to sustain appeal.)

Atlantic Reporter headnotes read as follows:

HN 1. Both terminal days within statute requiring publication of notice at least twice at intervals of not less than two days, the first not more than 15 days nor less than 10 days before hearing, and the last not less than two days before hearing, are excluded in the computation. C.G.S.A. § 8-7.

HN2. Notice was published on November 3 concerning hearing to take place on November 13 on request for

exception to substitute one nonconforming use for another was fatally defective on ground that intervening period between date of publication of notice and date of hearing was nine days instead of the 10 day statutory minimum. C.G.S.A. § 8-7.

HN6. Zoning Board of Appeals acting under statute empowering it to hear and decide appeals and all matters upon which zoning ordinance requires it to pass and to determine and vary application of zoning ordinance must conduct public hearing on each and every application submitted to it and must give timely and adequate notice in accordance with statute. C.G.S.A. § 8-6.

Within the decision there is the following statement: The powers and duties of the zoning board of appeals are to be found in General Statutes § 8-6. • • • Every application submitted to the board, whether for special exception or other specific matter provided for in the regulations, or for a variance, or in the nature of an appeal, requires a public hearing, notice of which must be published in a newspaper, having a substantial circulation in the town, at least twice at intervals of not less than two days, the first not more than fifteen days, nor less than ten days, before the hearing, and the last not less than two days before it. General Statute § 8-7. The notice in this case was first published on November 3. The hearing was scheduled for November 13. The statute uses the expression "nor less than ten days" for the period

of time which must elapse between the days of the first publication and the day of the hearing. Both terminal days are excluded in the computation. *Treat* vs. *Town Plan and Zoning Commission*, 145 Conn. 136, 139 A.2d 601. Only nine days intervened in this instance and the notice was fatally defective. *Ibid.*; *Slagle* vs. *Zoning Board of Appeals*, 144 Conn. 690, 693, 137 A.2d 542; *State ex rel Capurso* vs. *Flis*, 144 Conn. 473, 481, 133 A.2d 901; *Smith* vs. *F. W. Woolworth Co.*, 142 Conn. 88, 94, 111 A.2d. 552.

In the case of *Aurora* vs. *Zoning Board of Appeals of Town of East Haven*, 153 Conn. 623, 220 A.2d 277, it is stated (Headnote 2 of Atlantic Reporter)

> "Notice of hearing relating to application for zoning variance, which was published on January 13, 14 and 15 in a newspaper having substantial circulation, the hearing to be held on January 22, was fatally defective under statute requiring that notice of time and place of such hearing be published in a newspaper at least twice at intervals of not less than two days, the first not more than 15 days, nor less than 10 days, and the last not less than two days, before such hearing. C.G.S.A. § 8-7."

In the body of the case it is stated:

> "Obviously, this publication did not comply with the statutory requirement, and the notice was fatally defective. *Lunt* vs. *Zoning Board of Appeals*, 150 Conn. 532, 536, 191 A.2d 553. Compliance with the

statutory procedure for notice was a prerequisite to any valid and effective action of the zoning board in granting the requested variance. *Treat* vs. *Town Plan & Zoning Commission*, 145 Conn. 136, 139, 139 A.2d 601; *State ex rel. Capurco* vs. *Fils*, 144 Conn. 473, 481, 133 A.2d 901. Failure to give proper notice constitutes a jurisdictional defect. *Slagle* vs. *Zoning Board of Appeals*, 144 Conn. 690, 693, 137 A.2d 542; *Smith* vs. *F. W. Woolworth Co.*, 142 Conn. 88, 94, 111 A.2d 552."

In *Treat* vs. *Town Plan and Zoning Commission of the Town of Orange*, 145 Conn. 136, 139 A.2d 601, it was held that where notice of time and place of public hearing held on October 30th was published in a newspaper on October 20th and October 26, notice was published less than ten days before the public hearing as required by the General Statutes and further held that when so many days "at least" are given to do an act in a statute or "not less than" so many days must intervene, both the terminal days are excluded.

In *Smith* vs. *F. W. Woolworth Co.*, 142 Conn. 88, 111 A.2d 552, it is stated:

"• • • changes, variances and exceptions should not be permitted except after full and adequate notice as will enable parties having an interest to know what is protected and, thus, to have an opportunity to protest. *Kane* vs. *Board of Appeals*, 273 Mass. 97, 104, 173 N.E. 1; 2 Merrill, Notice, p. 285. Com-

> pliance with the provisions as to notice is a prerequisite to any valid action by the board. *Couch* vs. *Zoning Commission*, 141 Conn. 349, 356, 106 A.2d 173; *Lordship Park Ass'n* vs. *Board of Zoning Appeals*, 137 Conn. 84, 90, 75 A.2d 379. Failure to give proper notice constitutes a jurisdictional defect. *Hutchison* vs. *Board of Zoning Appeals*, 138 Conn. 247, 251, 83 A.2d 201. The proceeding which the board held was coram non judice. The grant of a variance was void."

In *Jack* vs. *Torrant*, 136 Conn. 414, 71 A.2d 705, it was stated:

> "A zoning law or regulation may be rendered invalid by reason of failure to comply with statutory provisions requiring notice and hearing; and, apart from such statutory provisions, it is generally held that the constitutional prohibition against deprivation of property without due process of law demands that persons having interests or rights in property be given adequate notice and an opportunity for hearing before passage of zoning laws or regulations affecting their rights and interests."

> "When municipal boards are called upon to perform legislative acts or acts involving discretion and judgment in administering public affairs, they can only act at authorized meetings duly held in default of which there can be no valid determination."

In the case of *Slagle* vs. *Zoning Board of Appeals of the City of Meriden*, 144 Conn. 690, 137 A.2d 542 it was held

that failure of a city zoning board to give notice of a hearing on application for a variance constitutes a jurisdictional defect, and in view of fact adequate notice is jurisdictional, and not merely a procedural matter, persons who appeared at such a hearing and failed to object could not be estopped from objecting later.

In *Gendron* vs. *Borough of Naugatuck*, 21 Conn. Sup. 78, 144 A.2d 818 it is stated at the end of the case:

> "There was a failure, here, to give adequate notice of the public hearing. This constitutes a jurisdictional defect. *Hutchinson* vs. *Board of Zoning Appeals*, 138 Conn. 247, 251, 83 A.2d 201; *Smith* vs. *F. W. Woolworth Co.*, 142 Conn. 88, 94, 111 A.2d 552; *Slagle* vs. *Zoning Board of Appeals*, 144 Conn. 690, 693, 137 A.2d 542. A jurisdictional defect is fatal. The notice not having been given as required by the statute, the hearing on January 25, 1955, was not a legal hearing and had no more effect in law than a fortuitous gathering of people. *Alderman* vs. *Town of West Haven*, 124 Conn. 391, 397, 200 A. 330; 1 Yokeley, Municipal Corporations, p. 437."

In *Pollard* vs. *City of Norwalk*, 108 Conn. 145, 142 A. 807, (Maltie, J.) it was stated a town can act legally only in a meeting duly warned and holden and the votes of a meeting, "of which notice has been given for less than the period required by the statute, though it be only for a single day, are no more binding upon the town than if the meeting had been held without notice, or had been

a mere fortuitous assembling of any portion of the inhabitants of the town."

In the case of *Alderman* vs. *Town of West Haven*, 124 Conn. 391, 200 Atl. 330. The Atlantic Reporter headnote reads:

> "In determining whether notice of public hearing on establishment or alteration of building lines of Town of Orange was given at least five days before hearing as required by special law, both terminal days must be excluded. 16 Sp. Acts 1913, p. 1160."

That failure to give the prescribed statutory notice is a jurisdictional defect necessitating the dismissal of an action is not confined to zoning is shown by the following.

In the case of *People* vs. *Reliance Fuel Oil Corp.*, 48 Misc. 2d (New York) 370 it is stated in the summary:

> "The Grade Crossing Elimination Act ([L. 1928, ch 678, as amended by L. 1962, ch 311], section 5, subd. 19) provides that, when the condemnation proceeding has reached a stage at which the State may bring summary dispossess proceedings, 'The petition shall be preceded by forty days' notice to quit, in the manner prescribed by [Real Property Actions and Proceeding Law, section 735], and the giving of such notice shall be stated in the petition. In these dispossess proceedings, the petition was dated and verified on October 20, 1965 and it alleges that notice to quit was served on September 14, 1965 — only 37 days earlier. This is a jurisdictional defect. The petition is dismissed."

In the body of the case it is stated:

> "Obviously, the State has failed to comply with this requirement (i.e. that the petition be preceded by forty days' notice to quit). But is this failure jurisdictional necessitating the dismissal of this action? The answer is in the affirmative."

In the case of *Home National Bank and Trust Company* vs. *Banking Commission of the State of Connecticut*, 26 Conn. Supp. 362, 224 A.2d 404, it is stated that the requirement that notice of hearing be given not less than twenty nor more than forty days prior to hearing was not observed and because notice was given 19 days prior to hearing there was a jurisdictional defect and since adequate notice is jurisdictional, and not merely a procedural matter that those who appeared at the hearing and failure to object were not estopped from objecting later and that the jurisdictional defect was fatal to the validity of the decision. A notice was mailed on September 1 and the hearing held on September 21. The case held that both terminal dates were to be excluded and that therefore notice of 19 days and not 20 days was given.

Thus again there was and is a failure to produce any facts showing compliance with the statutory law and complete failure to produce any facts that would justify a finding that the Linden Shore District was ever formed as a legal District.

All there is is a finding by Judge Norton M. Levine with no support in facts and none in his decision.

The conclusion is that there is no legal entity as a plaintiff. This point was made as soon as the evidence disclosed the failure of proof of the plaintiff's allegation in the summons and complaint that it was organized under C.G.S. § 7-325 delayed only until the Plaintiff closed its case to be assured no further evidence was being offered. Since no inclination to proceed was shown by plaintiff the motion to dismiss was made and Judge Norton M. Levine should have granted the motion then and there.

The Judge is not infallible.

In the case of *Sheridan v. Planning Board*, 159 Conn. 1, 12, 13 the trial Judge Norton M. Levine (the same judge as presided in this case) made a finding which Judge Thim characterized as made in error (page 12) and (page 13) wrote "We recognized that ordinarily the question of aggrievement is one of fact to be determined by the trial court. But such a finding may be set aside if it is legally or logically inconsistent with the facts or if some material error is made as to the law which applies so that the court's conclusion is unsound or violative of the plain rules of reason so as to be unwarranted in law. *Johnson v. Board of Appeals*, 156 Conn. 622, 624, 238 A.2d 413. (The Johnson named is the Petitioner Johnson the successful plaintiff appellant in that case and Petitioner herein) It is urged here that Judge Levine's decision be reversed herein on the grounds stated above.

CONCLUSION

It being apparent from the cases cited and the facts above set forth that the defects pointed out above are jurisdictional requiring dismissal of the action and can be raised at any time and is again raised in this court and being jurisdictional can not be waived, not even by silence nor by any other action or non action the conclusion is that "LINDEN SHORE DISTRICT" has never been legally formed as a District and is legally a non entity and not a legal entity entitled to act as plaintiff and bring a suit and that therefore the judgment in this care is void for lack of jurisdiction in the Court rendering same and judgment should be entered dismissing the action and same should be so order.

Respectfully submitted,

CAROL C. JOHNSON
Petitioner Pro Se
600 West 111th Street
New York, New York 10025
(212) 663-5445

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 28, 1985

Ms. Carol C. Johnson
600 West 111th Street
New York, NY 10025

Re: Carol Clement Johnson v. Linden Shore District, A-315

Dear Ms. Johnson:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Marshall, who on October 28, 1985, signed an order extending your time to and including November 19, 1985.

A copy of the Justice's order is enclosed. (NONE RECEIVED)

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By _____
Edward L. Turner, Jr.
Assistant Clerk

vm
Enc.

cc(letter only): John E. Donegan, Esq.

SUPREME COURT—SUPREME COURT
STATE OF CONNECTICUT

July 31, 1985

No. PSC-85-1001

LINDEN SHORE DISTRICT

v.

CAROL C. JOHNSON

ORDER

THE MOTION OF THE DEFENDANT, FILED JULY 29, 1985, TO REARGUE AND TO REOPEN THE DECISION AND TO INCLUDE REPLY, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDER DENIED.

By the Court,

FRANCIS J. DRUMM, JR.
Chief Clerk

BY: MICHELE L. ANGERS
Assistant Clerk-Appellate

NOTICE SENT: 7-31-85
Carol C. Johnson, pro se
John E. Donegan

SUPREME COURT
STATE OF CONNECTICUT

No. PSC-85-1001

Linden Shore District

v.

Carol C. Johnson

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (4 Conn. App. 225) it is hereby ordered that said petition be, and the same hereby is denied.

By the Court,

FRANCIS J. DRUMM, JR.
Chief Clerk

By CYNTHIA M. GWOUK
Assistant Clerk-Appellate

Dated: July 17, 1985

Notice to: 7-18-85
Clerk, Superior Court, New Haven—198891
Clerk, Appellate Court
Carol C. Johnson, pro se
John E. Donegan

Carol C. Johnson in support of petition—*John E. Donegan* in opposition.

ldc

LINDEN SHORE DISTRICT

v.

CAROL C. JOHNSON

(3321)

HULL, BORDEN and SPALLONE, JS.

Argued May 9—decision released June 11, 1985

Action to foreclose municipal tax liens on land owned by the named defendant, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Levine, J.;* judgment of strict foreclosure, from which the named defendant appealed to this court. *No error.*

Carol C. Johnson, pro se, the appellant (named defendant).

John E. Donegan, for the appellee (plaintiff).

PER CURIAM. We have reviewed the record and have closely examined the file and briefs[1] in this case. We find nothing to substantiate the named defendant's claim of error.

(Fixed at Dec. 3rd, 1985)

There is no error, but the case must be remanded with direction to modify the judgment by fixing new law days.

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1 During the course of the appeal, we denied the plaintiff's motion to strike the brief of the named defendant, without prejudice to the right of the plaintiff to renew its motion at the time of oral argument. The plaintiff renewed its motion. We again deny it.

Reported in 4 Conn. App. 225

[Filed May 15, 1984—George M. Fasanella, Asst. Clerk]

SUPERIOR COURT
JUDICIAL DISTRICT OF NEW HAVEN
AT NEW HAVEN

MAY 14, 1984

No. CV-81-0198891-S

LINDEN SHORE DISTRICT

v.

CAROL CLEMENT JOHNSON, ET AL.

MEMORANDUM OF DECISION

I

Plaintiff Linden Shore District is a District, organized and existing, pursuant to Sec. 7-325, *Gen. Stats.*, and is located in Branford. As to the purposes and functions of such a District, see Sec. 7-326, *Gen. Stats.* Sec. 7-325, *Gen. Stats.*, controls the procedure for establishing a District, such as Plaintiff.

The amended Complaint herein, dated January 17, 1984 (Pleading #126), seeks foreclosure of certain tax liens of Plaintiff against Defendant Johnson's residential property, located within said District. The tax years involved are October 1, 1971 - October 1, 1979, inclusive. As of the date of trial, in March, 1984, Plaintiff claims that the principal sum of $2,246.67 is due to its said liens, plus certain interest, costs, and fees. Sec. 187, *Practice Book*.

Plaintiff's real estate expert, John Dendas, testified, without contradiction, that the fair market value of Defendant Johnson's premises was $122,000.00, as of the time of trial. The amended Complaint recites that the only additional encumbrance on the premises is an attachment of Irving H. Perlmut-

ter, dated August 18, 1983, in the sum of $8,500.00. Under date of January 9 1984, said Perlmutter filed a Statement of No Defense.

Defendant Johnson appeared *pro se*. However, he alleged that he was an attorney, duly admitted to practice in the State of New York.

Any further reference herein to "Defendant", shall be deemed to pertain solely to Defendant Johnson, unless specific reference is hereafter made, by name, to Defendant Perlmutter.

II

At the conclusion of all the evidence, Defendant Johnson made oral and written Motions to dismiss this action. His written Motion dated March 30, 1984, (#129), requested an Order, dismissing the Complaint. His Motion stated: "The ground being that there is no Plaintiff. 'Linden Shore District' is not a District."

Defendant Johnson urged, in Motion #129, that since Plaintiff has no legal existence, therefore, it is not qualified to prosecute the instant action against him. Defendant Johnson submitted that Plaintiff did not fully comply, at the outset, with the procedure in Sec. 7-325, *Gen. Stats.*, relative to formation of Districts. Defendant Johnson asserted that the claimed defects in organization of Plaintiff, dating back to 1959, are "jurisdictional," and thus operate to nullify the instant foreclosure action.

Pursuant to a Memorandum of Decision of this Court, dated May 11, 1984, (#139), the Court denied Defendant Johnson's said Motion to Dismiss. (#129). The contents of said Memorandum of Decision are incorporated herein, with the same force and effect as if set forth herein at length.

III

Defendant Johnson also filed a post-trial Motion (#133) to offer a deed of real property in evidence. The grantor in said deed was the First Ecclesiastical Society of the Town of

Branford, and the grantee was Linden Shore District, Plaintiff herein. The deed was dated January 9, 1961, and was recorded on January 10, 1961.

In its Memorandum of Decision dated May 11, 1984, (#140), this Court denied Defendant Johnson's post-trial Motion, (#133) to offer said deed in evidence. The Court's said Memorandum of Decision is likewise incorporated herein by reference, with the same force and effect as if fully set forth herein.

IV

Both parties filed voluminous briefs, following conclusion of the instant trial.

Plaintiff asserted that the basic allegations of an action to foreclose a municipal tax or assessment lien are contained in Sec. 187, *Practice Book*, and that it had fully complied with the requirements set forth therein. Plaintiff stressed that portion of Sec. 187, which states that any claimed informality, irregularity or invalidity in the assessment, or attempted collection, of the tax, or in the lien filed, shall be matter of affirmative defense, to be alleged and proved by Defendant Johnson.

Plaintiff maintained that it had fully and completely complied with the terms and conditions of Sec. 187. Plaintiff introduced a number of exhibits, by way of rebutting Defendant Johnson's claim that in 1959, (about twenty-four years ago), improper, inadequate, or illegal notice of the matter of formation of Plaintiff District had been given. Sec. 7-325, *Gen. Stats.*

V

Defendant Johnson's post-trial brief, dated April 13, 1984, (#134) essentially makes one argument. He once again claims defects in the posting of notices in 1959, relative to the original formation of Plaintiff District.

The Court had already ruled on these contentions of Defendant Johnson, when it denied his Motion #129, which sought an Order dismissing the Complaint. There is no merit in

repeating herein the contents of the Court's prior Memorandum. Said comments and conclusions likewise apply to Defendant Johnson's identical allegations, as contained in the main portion of his instant post-trial brief.

However, it should be noted that Defendant Johnson's allegations, as to lack of subject matter jurisdiction, are not actually germane to his Special Defense, that Plaintiff was not duly and properly organized. Defendant Johnson's instant argument is, in reality, much more restricted than a jurisdictional one. The plain fact is that he is making an unrelated, and non-jurisdictional, contention, to wit, that Plaintiff lacked legal capacity to commence the instant lawsuit. In any event, there is no credible evidence to support Defendant Johnson's allegations on this issue.

VI

Defendant Johnson also filed a one-page Addendum to his post-trial brief, and a Supplement to his trial brief, dated April 21, 1984 (#138). He attempted therein to present a number of arguments; repeating most, if not all, of the Special Defenses contained in his Answer.

The contents of his Addendum and Supplement do not assist Defendant Johnson. First, they lack persuasive evidence, in support thereof. Next, they are not pertinent to the legal requirements, for prosecuting a tax foreclosure claim of this type, and any proper defenses thereto. Finally, in these two documents, Defendant Johnson does not cite any legal authorities whatsoever, other than Sec. 7-325, to bolster his contentions. A detailed commentary on the text of the Addendum and Supplement would, therefore, serve no useful purpose.

VII

The more credible evidence supports Plaintiff's contentions herein. Defendant Johnson failed to sustain his burden of proof, relative to his Special Defenses. The Court concludes that Plaintiff is entitled to a judgment in its favor, authorizing it to foreclose the tax liens described in its amended Complaint.

A Judgment of Strict Foreclosure of said liens may, therefore, enter in favor of Plaintiff, and against Defendant Johnson. The Court finds the debt, for the liens involved, to be $2,246.67, exclusive of interest and taxable costs, as allowed by law.

The fair market value of the instant premises is found to be $122,000.00

VIII

Reference is now made to the problems of fees, costs, and a law day.

The Court will allow an appraiser's fee of $250.00, covering services of John Dendas, as Plaintiff's expert, and will establish a law day of June 3, 1985, as to Defendant Johnson, with subsequent days for subsequent encumbrances.

Relative to an attorney's fee for Plaintiff, Plaintiff requested a $5,000.00 fee. Plaintiff's counsel asserted in his brief dated April 9, 1984, that he did spend roughly 50.4 hours relative to this case, including preparation for trial, time on trial, and the preparation and filing of final briefs.

In the opinion of the Court, the $5,000.00 fee is substantially in excess of a fair allowance, under all the circumstances herein. Sec. 12-193, *Gen. Stats.*, permits a municipality to recover reasonable attorney's fees, arising out of a tax foreclosure proceeding. However, it must be remembered that the principal debt herein is merely $2,246.67.

When the Court is confronted with the difficult problem of fixing a fair and reasonable counsel fee, the time spent by the claimant's attorney is obviously a major and legitimate consideration. In addition, the Court has to bear in mind other factors, such as the amount in controversy, as bearing on the reasonable amount of legal fees. *Burritt Mut. Savings Bank* v. *Tucker*, 183 Conn. 369, 376.

Under the circumstances, the Court will allow a counsel fee of $1,750.00, as a fair and reasonable sum, for the services performed to date herein by Plaintiff's counsel.

/s/ LEVINE, J.

Levine, J.

[Filed May 14, 1984—George M. Fasanella, Asst. Clerk]

SUPERIOR COURT
JUDICIAL DISTRICT OF NEW HAVEN
AT NEW HAVEN

MAY 11, 1984

NO. CV 81-0198891-S

LINDEN SHORE DISTRICT

v.

CAROL CLEMENT JOHNSON

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR ORDER DISMISSING COMPLAINT (NO. 129)

I

Preliminary Statement

Plaintiff is a District, organized and existing pursuant to Sec. 7-325, *Gen. Stats.*, and is located in Branford. The purposes and functions of such a District are outlined in Sec. 7-326, *Gen. Stats.* The procedure for establishing a District is contained in Sec. 7-325, *Gen. Stats.*

In 1981, Plaintiff commenced this action to foreclose certain of its tax liens (from October 1, 1971 - October 1, 1979) against Defendant's residential property, located within said District. As of the date of trial, in March, 1984, the amount claimed due by Plaintiff on its liens was $2,246.67, plus certain interest, costs and fees. Sec. 186-187, *Practice Book*.

Defendant appeared *pro se*. He alleged that he was an attorney, duly admitted to practice in the State of New York.

The case proceeded to trial in March, 1984. At the conclusion of Plaintiff's evidence, Defendant made an oral Motion to

Dismiss the case, based on a claimed lack of jurisdiction of this Court to hear the case, because, "The Plaintiff is not a legal entity". The Court denied Defendant's oral Motion. Defendant's oral Motion did not make it clear whether he was challenging the Court's jurisdiction over his person, or, in the alternative, the Court's jurisdiction over the subject matter. See Sec. 142, 143, and 145, *Practice Book*.

At the conclusion of all the evidence, Defendant made a second oral Motion to dismiss this action, because, "The Plaintiff is not a legal entity". The Court directed Defendant to file a written Motion, and to comply with Sec. 142, *Practice Book, et seq.*, relative to such Motions, insofar as they were applicable. Sec. 143, *Practice Book*, mandates that such a Motion must be in writing. Defendant did file a written Motion dated March 30, 1984, and, once again, moved for dismissal of the Complaint. The text of his Motion states, in part, "The ground being that there is no Plaintiff. Linden Shore District is not a District".

Defendant's basic claim is that Plaintiff has no legal existence, because it did not comply, at the outset, with the procedure in Sec. 7-325, *Gen. Stats.*, relative to formation of Districts. He asserts that the procedures for formation of the District must be approved at a meeting, or at a hearing. He urges that said hearing must be called by posting a notice thereof, and that lack of such posting is "jurisdictional".

Defendant further argued, at trial, that there was no proof whatsoever of proper posting of notice of the organization meeting, pursuant to the controlling statutes.

Once again, it is not clear, from the contents of Defendant's Motion dated March 30, 1984 (#129), whether he is challenging jurisdiction of his person, or jurisdiction over the subject matter, to wit, *in rem*. If his Motion is viewed as an attack on *in personam* jurisdiction, it appears that he has waived his right thereto. Sec. 142, *Practice Book*.

Nevertheless, the Court has determined to give Defendant some latitude, and to rule on and interpret his Motion, by classifying it as an objection to subject matter jurisdiction. An *in rem* objection may be raised at any time. Sec. 145, *Practice Book*.

Under Sec. 145, *Practice Book*, any claim of lack of jurisdiction over the subject matter cannot be waived. However, it appears that on March 17, 1982, Defendant filed a General Appearance, thereby submitting himself to the jurisdiction of the Court, at that time. He did not press vigorously any jurisdictional challenges, of any type, until the time of trial, in March, 1984, as summarized hereinabove.

II

The Posting Issue

A decisive answer to Defendant's contention is found in Plaintiff's Exhibit A, which was admitted in this case. Exhibit B to that Exhibit, to wit, an "Affidavit of Notice", is very significant. The contents of said Affidavit executed (some twenty-four years ago), and signed by the three then Selectmen of the Town of Branford, dated August 5, 1959, recite three procedures utilized by them, to give notice of the meeting of the voters in the area involved, relative to formation of the Plaintiff District. Defendant offered no satisfactory proof at the trial, to attack the contents, or veracity, of said Affidavit.

Defendant's final claim is that he never received any ". . . notice of meeting", in 1959. There is no showing that, under the pertinent statutes, personal service of the notice should have been made on Defendant, in 1959, as a condition of a valid formation of such a District, pursuant to Sec. 7-325, *Gen. Stats.*

III

Additional Comments

Essentially, Defendant is challenging the legal status of Plaintiff, as a proper entity to bring this action. It is highly doubtful whether this is a proper jurisdictional objection. It has been recently stated that a Motion to Dismiss cannot be used to challenge the competence of a corporation to commence an action. *T.K. Auto Rental* v. *Mahon*, 9 Conn. L. Trib. No. 35, p. 16, August 29, 1983.

The general procedures, relative to filing of a Motion to Dismiss, were discussed in *Chrysler Credit Corporation* v. *Fairfield Chrysler-Plymouth, Inc.*, et al., 180 Conn. 223, 227.

In *Monroe* v. *Monroe*, 177 Conn. 173, 185, the Court denied a claim of the Plaintiff, seeking to vacate a judgment of divorce. Plaintiff asserted that the Referee who conducted the hearing, without objection from the parties or their counsel, lacked jurisdiction over the subject matter of the divorce, because the record contained no valid Order of Reference to him. Rejecting this argument, in *Monroe*, the Supreme Court stated:

> "Such oversights are not jurisdictional defects for the purpose of collateral attack on a judgment." (p. 185).

In *Monroe*, the Court quoted, with approval, the case of *Lacks* v. *Lacks*, 41 N.Y. 2d 71, 74-77. It observed that Chief Judge Breitel, in *Lacks*, had noted, at length:

> " . . . the ambiguities inherent in the concept of subject matter jurisdiction." (p. 185).

In the instant case, Defendant did not sustain his burden of proof, so as to demonstrate clearly that there was, technically or otherwise, a lack of subject matter jurisdiction in this case.

In *Monroe*, the Court also stated:

> " . . . every presumption favors the jurisdiction of a court . . . ." (p. 177).

There is a presumption of the validity of liens, such as the instant tax lien. Defendant did not offer persuasive evidence to overcome that presumption. *Town of Wallingford* v. *Glen Valley Associates, Inc.*, 190 Conn. 158, 163.

Sec. 187, *Practice Book*, captioned, "Foreclosure of Municipal Liens", also states, in part, as follows:

> "Any claimed informality, irregularity, or invalidity in the assessment or attempted collection of the tax, or in the lien filed, shall be matter of affirmative defense, to be alleged and proved by the defendant."

IV

Conclusion

Defendant's Motion to Dismiss, (#129), dated March 30, 1984, is denied, in all respects.

/s/ LEVINE, J.
Levine, J.